Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

MARCH TERM, 1980

No. 79-1340

HODGES TRANSFER COMPANY, INC., et al,

Appellants,

VS.

ALABAMA PUBLIC SERVICE COMMISSION, et al,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF ALABAMA

JURISDICTIONAL STATEMENT

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DATED: March , 1980

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ON APPEAL FROM THE SUPREME COURT OF ALABAMA

JURISDICTIONAL STATEMENT

Hodges Transfer Company, Inc., John E. Hodges and Robbie D. Wood, hereafter called "Hodges", appeal from the Judgment of the Supreme Court of Alabama dated September 21, 1979 and Order, dated November 2, 1979, denying their application for rehearing. Hodges was deprived of its property without due process of law guaranteed by the Fourteenth Amendment of the Constitution of the United States, in that (1) there was no finding of fact by the Alabama Public Service Commission, hereafter called "APSC", based on evidence in the case, (2) there was finding of fact by the APSC for which there was no evidence of record, (3) there was finding of fact by the APSC con-

trary to the evidence in the case and, (4) failure of APSC to follow its own rules and regulations. The Appellees consist of the APSC, before which this cause was heard on a formal complaint, and Ross Neely Express, Inc., Baggett Transportation Company, Inc., Alabama Bulk Carriers, Inc., Schwerman Trucking Company, Arrow Truck Lines, Inc., Southern Haulers, Inc., and Truck Transport, Inc., hereafter called "Complainants" who filed the formal complaint.

OPINIONS BELOW

The Opinion of the Supreme Court of Alabama, dated September 21, 1979, the Decree of the Circuit Court of Blount County, Alabama, dated October 20, 1978, the Report and Order of the APSC dated June 20, 1977 and the Report and Recommended Order of the Examiner dated April 17, 1977 are not reported but are reprinted in the appendix hereto respectively at A-3, A-9, A-15, and A-18.

JURISDICTION

The judgment of the Supreme Court of Alabama, affirming the Report and Order of the APSC which ordered Hodges to cease and desist operations over practically all its territorial authorization, was entered on September 21, 1979. See A-3, infra. The application for rehearing was entertained and denied on November 2, 1979. See A-2, infra.

A notice of appeal to this Court was duly filed in the Supreme Court of Alabama on January 17, 1980. See 1-A, infra. In application for extension of time to docket the appeal on or before March 1, 1980 was granted.

This appeal is being docketed on this Court within 120 days from the denial of the rehearing below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (2).

QUESTIONS PRESENTED

Whether or not Hodges has been denied its property by APSC without due process of law guaranteed by the Fourteenth Amendment of the Constitution of the United States when, on formal complaint of other appellees before APSC which alleged that territorial operations of Hodges were illegal, APSC ordered Hodges to cease and desist operations over practically all of its territory although (1) complainants failed to prove illegality under the Alabama Statutes and the Rules of Procedure of the APSC, (2) the only evidence introduced in the complaint case, from which APSC made no finding of fact, substantiated the legality of the operation of Hodges and (3) the APSC based its Order on findings of fact which were either unsupported by evidence or contrary to the evidence in the case.

CONSTITUTIONAL PROVISIONS AND RULES

Fourteenth Amendment, U.S. Constitution,

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

Alabama Code 1975 § 35-1-124:

> The commission's order shall be taken as prima facie just and reasonable. No new or additional evidence may be introduced in the circuit court, except as to fraud or misconduct of some person engaged in the administration of this title and affecting the order, ruling or award appealed from, but the court shall otherwise hear the case upon the certified record and shall set aside the order if the court finds that:
>
> (1) The commission erred to the prejudice of appellant's substantial rights in its application of the law; or

(2) The order, decision or award was procured by fraud or was based upon a finding of facts contrary to the substantial weight of the evidence.

However, the court may, instead of setting aside the order, remand the case to the commission for further proceedings in conformity with the direction of the court. The court may, in advance of judgment and upon a sufficient showing, remand the case to the commission for the purpose of taking additional testimony or other proceedings. (Acts 1932, Ex. Sess., No. 232, p. 233; Code 1940, T. 48, § 82.)

Alabama Code 1940 Title 48 § 301 (8) :

Certificate of convenience and necessity. — A. Except as otherwise provided in this section no common carrier by motor vehicle subject to the provisions of this article shall engage in intrastate commerce on any highway in this state unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the commission pursuant to the provisions of this article, authorizing such operation; provided, however, that subject to section 301 (12) of this title, if any such carrier of property, except common carriers of passengers by motor vehicle, or predecessor in interest was in bona fide operation as such common carrier of property by motor vehicle prior to the effective date of this article, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation prior to article during the season ordinarily covered by its operation, except in either instance as to interruptions in service over which the applicant or its predecessor in interest had no control, the commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further

proceedings, if application for such certificate is made to the commission as provided in paragraph B of this section, and within one hundred twenty days after this section shall take effect. * * * *

Rule X APSC Rules of Practice:

1. At hearings on formal complaint or petition the Complainant or Petitioner, as the case may be, shall open and close. At hearing on applications for any relief under the law, the applicant shall open and close. At hearing under citations issued by the Commission upon its own motion, the Respondents shall open and close. In hearings of several proceedings upon a consolidated record, the Commission or presiding Commissioner or Examiner shall designate who shall open and close. Intervenors shall follow the party or parties in whose behalf the intervention is made, and where the intervention is not in support of either original party, the Commission or presiding Commissioner or Examiner shall designate at what stage such Intervenors shall be heard.

2. Witnesses will be sworn and examined orally before the Commission or presiding Commissioner or Examiner.

3. Depositions may be taken in the manner prescribed by law and made a part of the record.

4. The Complainant or Petitioner must, except as otherwise provided by law, establish the facts alleged by him as a basis for the relief sought, unless the party against which the complaint or petition is directed admits the same. All facts alleged in answers or other pleadings must be proved by the party making such answers unless admitted by the Complainants or Petitioners. In cast of failure to plead or answer in any proceeding upon complaint or petition, the Commission may take such proof of the facts as may be

deemed proper, and make such order thereon as the facts and circumstances of the case require.

RAISING THE FEDERAL QUESTION

Hodges raised the claim that it had been denied due process in its Exceptions filed on May 24, 1977 to the Report and Recommended Order of the examiner, assigning as error (1) failure to make a finding of fact, (2) failing to make a finding of fact based on evidence, and (10) finding of fact not based on evidence in the case but contrary to the evidence in the case.

In Hodges' appeal to the Circuit Court it assigned as error (g) that the findings of the APSC were contrary to evidence (i) APSC violated and ignored the established rules of construction in construing and declaring the authority of Hodges and (j) the order of APSC deprived Hodges of property without due process of law.

The claim was again raised in Hodges' appeal to the Supreme Court of Alabama by designating as an issue: Issue III: Whether or not Hodges has been deprived of due process by failure of APSC to make findings of fact based on evidence which was introduced in the hearing.

The Supreme Court of Alabama recognized the claim that (3) "It [Hodges] has been denied due process by failure of APSC to make a finding of fact based on evidence introduced". And then summarily disposing of the claim by stating:

> "Likewise, Hodges' due process argument is far a field and without merit. The facts and law needed to adjudicate the issue in this case were presented to the examiner".

STATEMENT OF THE CASE

Hodges was granted authority by APSC Orders on September 23, 1942 and November 11, 1942 under the "Grandfather" statute, Title 48, § 301 (8) Alabama Code of 1940, to continue its existing operations without proof of public convenience and necessity. The grant authorized Hodges to transport specified commodities:

> "Truckloads only, not less than 10,000 pounds, between Uniontown and points in Alabama within 200 miles radius thereof, irregular routes".

Hodges contended, in line with the unanimous interpretations of authority issued by the Interstate Commerce Commission since prior to the issuance of Hodges' authority, that it was authorized to transport its commodities non-radially between any points in Alabama within 200 miles of Uniontown. If the authority was radial, i.e., restricted to shipments which must originate or be destined to Uniontown, the authority would have to be phrased: "Between Uniontown, on the one hand, and, on the other, points in Alabama within 200 miles thereof.

The grant was based on a tabulation of shipments, at least 570 truckloads of which, in 1940, neither originated at, nor were destined to Uniontown, Alabama.

Hodges introduced in the complaint case — without objection — the entire grandfather case including the above tabulation of shipments. Complainants demanded a late-filed exhibit showing that such operations were continued after the initial grant. Hodges complied with the demand by filing copies of original ledger sheets for two random years, 1946 and 1960, which showed a continuation of the same non-radial operations.

There were no findings of fact by the examiner or APSC bearing on the grandfather and late filed exhibits.

Hodges introduced a letter from John W. Cooper to Hodges dated December 4, 1975, a copy of which was received by Mr. Evans, the Attorney Examiner for the APSC and who conducted the complaint case, memorializing a consultation with Mr. Evans concerning the authority here in question. The letter stated, in part,:

> "Mr. Evans stated that he did not have the authority from the Alabama Public Service Commission to give an opinion on behalf of the Alabama Public Service Commission, however, it was his considered opinion that, under the facts as applicable to your [Hodges] certificate, i.e., that a large portion of the grandfather shipments were so handled [i.e. non-radially], the interpretation by the Interstate Commerce Commission of similar authority and the fact that the case of Alabama Public Service Commission v. A.O.K. Motor Lines, 249 So2d 838, recognizes the necessity and application of the words of extremity "on the one hand" and "on the other hand" to designate the restriction of shipments to and from a base point, you did have the authority to transport between any two points within the 200 mile radius. It is to be noted that the A.O.K. authority was issued prior to the issuance of your authority in grandfather proceedings".

Mr. Evans did not reply to the letter either orally or in writing until he was called by the complainants to testify during the oral hearing that he was conducting. In his testimony he acknowledged receipt of the letter and stated that he thought the contents of the letter were a little strong and intended to reply but never did. He did not, however, deny the contents. He further testified, in part, as follows:

> "I don't remember my exact statement to it; but I'm sure I was of the opinion then as I am now, after such unusual circumstances, and this is my understanding the way the Interstate Commerce Commission interpreted that if you have that type of wording, without

> those extemporaneous "On the one hand and on the other hand", the Interstate Commerce Commission would interpret it as meaning in effect from, to and between all points within a certain radius."

The above letter, and testimony were the only evidence of industry usage in the case and is contrary to the only finding of fact made by the examiner in his Report and Recommended Order which was approved by the APSC.

The formal complaint against Hodges charged, paragraph 7,

> "7. Historically, whatever operations have been conducted by John E. Hodges, d/b/a Hodges Transfer Company pursuant to certificate no. 518 have been operations wherein the traffic transported either originated at or was destined to the point of Uniontown, Alabama. Subsequent to the incorporation of Hodges Transfer Company, Inc., [1976] and the purchase of said corporate entity's capital stock by Robbie D. Wood, Hodges Transfer Company, Inc., has been engaged in the transportation of commodities which neither originate in nor are destined to Uniontown, Alabama"

There was no evidence whatsoever introduced by complainants to substantiate the charge; the only evidence introduced, for which no finding was made, contradicted the charge. Hodges has indicated by marginal notations on the Report and Recommended Order, statements which were unsupported by any evidence of record.

The only evidence introduced by complainants was the testimony of Mr. Evans pertaining to the letter of December 4, 1975 and the stipulation by Hodges that it was, and always had been, transporting commodities between points within the said 200 mile radius, neither the origin nor destination of which were Uniontown, Alabama.

Thus, after ignoring and failing to make findings of fact based on the crucial evidence introduced and making findings of fact which were either unsupported by or contrary to evidence of record, the APSC ordered Hodges to cease and desist transporting commodities within the said 200 mile radius except those that either originated at or were destined to Uniontown, Alabama. For practical purposes this small carrier was required to stop operating approximately 99 percent of its authority-operations which had been continuous since before the grant of grandfather rights. Neither the Circuit Court nor the Supreme Court of Alabama justified, treated, or distinguished the violations of due process in taking away the authority, a valuable property right.

THE QUESTION IS SUBSTANTIAL

The question of Fourteenth Amendment implications is not necessarily novel in its application to a required finding of fact, but it is novel in implications when the failure to make such finding of fact is used — patently, arbitrarily and capriciously — to strip a small carrier of its operating authority. The question is substantial not only to guarantee Hodges fair play in the construction of its authority, but, as the examiner stated in his report and order:

> "The examiner is very much aware of the fact that there are numerous carriers which hold authority from this Commission worded similarly to that held by Hodges Transfer Company, Inc. Therefore, the interpretation based on certificate 518 in the instant proceedings could have far reaching effect upon such other similarly worded authorities."

That far-reaching effect could cause those carriers to lose valuable operating authority — authority that was validly

issued to them based on grandfather operations and based on expertise of the Commissioners who were utilizing verbiage peculiar to the trucking industry in their descriptions — with no chance to be heard.

It has been mentioned above that the unanimous decisions of the Interstate Commerce Commission hold that the verbiage of Hodges authority authorized it to transport commodities from, to and between *any* two points within the 200 mile radius. Especially cogent is the case of Hilt Truck Lines Inc. — Investigation of Operation and Revocation of Certificates, decided July 26, 1972, 117 MCC 22 (23-24).

> "There remain for consideration several questions as to the legality of Hilt's operations under various of its territorial authorities. The first such issue is whether its Sub-No. 121 rights authorizing the carriage of groceries and grocery store supplies "between Smith Center, Kans., and points in Nebraska" are radial or nonradial in nature.*** The examiner, however, found the questioned rights to be nonradial in nature so as to permit the transportation of traffic, moving in interstate or foreign commerce, between any pair of points in the involved State.

We agree with the examiner. From the inception of Federal motor carrier regulation this Commission has used three separate, distinct, and mutually exclusive terminologies to authorize irregular-route trucking operations. These are the simple and self-explanatory "from and to" description, and the radial and non-radial "between" descriptions. A radial description depicts operations between a base point and other points in a described area; employs the language "between * * *, on the one hand, and, on the other, * * *"; and is limited to the transportation of traffic from and to the base point or points. In contrast, a nonradial grant which is described in terms of service

"between * * * and * * *" authorizes operations between all points within the described area.

We are aware of the possibility that a grant of radial, rather than nonradial, authority may have been intended. The grant actually made, however, is the one that we are here called upon to construe. As we emphasized in our discussion of respondent's "groceries, and grocery store supplies" commodity authority, motor carrier certificates and permits are not generally subject to collateral attack with respect to their meaning. Such franchises must be construed on their face without examining the underlying record unless those terms are patently ambiguous. Here, it is not the wording of the considered certificate itself that suggests ambiguity, but rather a "hunch" or suspicion which one might have that the grant of nonradial authority was made in a situation which more often than not would call for the issuance of radial rights. The phrasing so employed is not ambiguous. Accordingly, applicant lawfully performed the transportation described in footnote 39, supra, which involved movements between points in Nebraska, pursuant to its Sub-No. 121 territorial rights."

Footnote 40 to the Hilt case cites Fox-Smythe Transportation Co. Extension — Oklahoma 106 MCC 1 (26 and 27) (1967), for a discussion of the three mutual exclusive methods. See also Bell Transportation Co., Inc., 79 MCC 721 and Shipley — Control and Purchase (portion) — Virginia-Carolina Freight Lines, Inc., 257 MCC 22 (23-24), all of which define, distinguish, and describe the terminology used and utilized in the trucking industry for radial and non-radial authority.

Alabama's Supreme Court, in the case of Murray v. Service Transport, 29 So.2d-221 (222, 223) 252 Ala. 683 recognized the technical verbiage peculiar to the industry in holding:

"It is for the courts to construe the orders of the Commission, but contemporary construction and official usage are among the legitimate aids in the interpretation of statutes. This rule is particularly applicable when considering rules or orders by a department charged with the duty of making and enforcing same. Alabama Power Co. v. Patterson, 224 Ala. 3, 138 So. 421.

Whenever a judgment entry is not clear on its face it should be interpreted in the light of the pleadings and the entire record. Taunton v. Dobbs, 240 Ala. 287, 199 So. 9; Griffin v. Proctor, 244 Ala. 537, 14 So. 2d 11t. By analogy the same rule applies to rules and orders of the Public Service Commission of this character."

******

"The court having the benefit of the oral testimony and stipulations, and arguments of the respective counsel, is of the opinion that said restrictions in the certificate of convenience and necessity of May 20, 1946, should be given its trade and technical meaning, and that, therefore, Service Transport, Inc., respondent, insofar as the evidence in this case shows, are operating within the purview and line scope of its authority, within said restrictions of the Public Service Commission."

The above mentioned Towns Truck Lines vs. Cotton State Express (Supra) further stated (405):

> "These orders are made in the exercise of a quasi-judicial power, and partake somewhat of the nature of a formal judgment rendered within the administrative expertise of the public agency. A greater degree of precision attends the terms employed than is present in contracts between individuals."

The case of Flagg-Utica Corporation vs. City of Florence, 156 So. 2d, 338 (343) 275 Ala. 475 affirms the above as follows:

> "To arrive at the true sense in which parties have employed words of a written contract, Courts may consider the occasion which gives rise to the contract, relation of the parties, and object to be accomplished. Obermark vs. Clark, 216 Ala. 564, 114 So. 135, 55 ALR 1153."

The case went to affirm the case of Moss vs. Gulf States Steel Corporation, 140 So. 402 (405), 224 Ala. 430:

> "Trade terms and expressions peculiar to the business and not of common knowledge are subject to definition in their relation to the case in hand in pleadings and in proof. In Assigned Car Cases, 274 U. S. 564, 568, 47 S. Ct. 727, 71 L. Ed. 1204, there is a definition of "assigned cars," evidently disclosed from the record before the court. Whether the definition in the instant case be precisely the same is immaterial. The special meaning at this time and place in the dealings between these parties is the vital concern.
>
> The alleged custom of business is directed to an explanation of the clause requiring deliveries made "when assigned cars are furnished."
>
> ******
>
> "If, unexplained, the first-quoted clause would imply no duty to ship in other than "assigned cars," such meaning would be rendered at least ambiguous by the contract as a whole, especially the last-quoted clause."

See also Home Insurance Company vs. Pettit, 143 So. 839 (841).

Your Appellants, therefore, endeavored, in the hearing before the APSC, to meet the requirements as outlined by this Honorable Court. Your Appellant believes that it met those requirements. Your Appellants believe that the Appellees failed to meet their requirements.

The case of Towns Truck Lines v. Cotton State Express, 94 So.2d 402, 266 Ala. 131, affirmed in Cooper Transfer

Company v. APSC, 152 So.2d 424, 275 Ala. 99, recognized and established that:

> "The terms and conditions of a certificate of convenience and necessity are to be determined by the conditions at the time of issuance of the certificate."

The Supreme Court of Alabama has recognized the descriptive requirements of radial and non-radial authorities in the case of Alabama Public Service Commission v. A.O.K. Motor Lines, 249 So.2d 838. It is also of very great importance that the court recognized not only some of the I.C.C. cases underlying the *Hilt* case, supra, but also that the distinctions between radial and non-radial authorities were well established at the time the grandfather authority herein questioned was issued. In the A.O.K. case, supra, the Alabama Supreme Court stated:

> Certificate No. 2656 provides, inter alia, that Cole, to whose rights A.O.K. succeeded, is authorized to transport general commodities between Birmingham and points within 15 miles thereof "on the one hand," and certain points named in the certificate "on the other hand." That is, the shipments must either originate at, or be destined for, Birmingham or some point within a 15 mile radius thereof.
>
> The construction of the words "on the one hand" and "on the other hand" has not before been before this Court. However, the Interstate Commerce Commission has been called upon to decide the proper construction of said words, and, in the absence of authority in this state, we look to the decisions of the Interstate Commerce Commission relating to the question involved herein for guidance in establishing this state's position.
>
> In Gay's Express, Inc. v. Haigis et al., 43 MC 277, 4 FCC Par. 30741, the Board, directing its attention to the proper construction of the words in question, stated as follows:

"The words 'on the one hand' and 'on the other' contained in defendant's certificate, are words of extremity in both common and legal parlance. *They were used in defendant's certificate, as they have been in many others, for the sole purpose of identifying the operations authorized as radial operations between a base point and other points in a described area, as distinguished from an unlimited non-radial operation between described points within described areas.*" Id., at 279. (Emphasis ours)

The Board's statement of the meaning of the aforequoted phrases was as follows:

"The accepted meaning of these words when so used has long been recognized in transportation parlance as words of limitation in restricting operations of a carrier in such a manner as to require the carrier to operate from the base point to a point in the radial area, or from a point in the radial area to the base point."

On Rehearing, the Supreme Court stated:

"A.O.K. further argues, on rehearing, that the interpretation accorded the phrases "on the one hand" and "on the other" as expressed in Gay's Express, Inc. v. Haigis et al., 43 M.C.C. 277, 14 F. Carr. Cas. Par. 30741, and King Van Lines, Inc., Investigation of Certificate, 84 M.C.C. 269, 14 F. Carr. Cas. Par. 35080 (affirmed 220 F. Supp. 551, 15 F. Carr. Cas. Par. 81562), is not controlling here since such interpretation had not been established at the time of the issuance of Certificate No. 2656 to Cole, the predecessor of A.O.K. However, *this Court finds that such language was in common use in the motor carrier industry at the time of, and prior to, the issuance of the certificate involved herein.* In Jack Cole Company, Inc., Investigation of Certificate, 32 M.C.C. 199, a decision rendered by the Interstate Commerce Commission on January 31, 1942 (prior to the issuance of Certificate No. 2656 in the case at bar), the phrases "on the one hand" and "on the other" were given the same interpretation as expressed later in Gay's Express, Inc. v. Haigis et al., supra, and King Van Lines, Inc., Investigation of Certificate, supra. It is also interesting to observe in that case the I.C.C. noted its use of these phrases in numerous instances involving an irregular-route radial-service carrier to differentiate between base point and points in the radial area." (Emphasis ours)

The Alabama statute authorizing appeal from a decision of the APSC, § 37-1-124 Ala. Code 1975, specifies that the exclusive grounds for reversal, viz: (1) fraud — which is not here applicable —, (2) erroneous application of the law to the facts, and (3) a *finding of facts* contrary to the *substantial* weight of the evidence.

Thus, not only did the legislature specify the grounds of reversal but it *required* a finding of fact by the APSC and that finding of fact was required to be based upon *substantial* evidence. Hodges has not been afforded the favor of compliance with the statute. The case law in Alabama demands compliance with the fact-finding requirement or there has been no due process. APSC v. Nunis, 39 So.2d 409, 252 Ala. 30 (1949), APSC v. Higginbotham, 56 So.2d 401, 256 Ala. 621 (1951).

The fact-finding function serves two important purposes: (1) it is an indispensable prerequisite to the effective judicial review and (2) it necessitates clear, hard thinking on the part of the administrative body. As such where a decision is accompanied by express findings of fact, a reviewing tribunal can more easily ascertain whether the decision follows as a matter of law from the facts stated as its basis and likewise whether such facts have substantial support in the evidence. In the absence of findings of fact, the court cannot determine eithef of the functions. Saginaw Broadcast-

ing Company v. FCC, 96 Fed.2d 554, (559) (App. D.C. 1938). See also Byse, Requirement of Findings and Reasons for Formal Proceedings in Administrative Law, 26 Am. J. Comp. Law 393, at note 1 (Supp. 1978).

If an agency decision is not supported by a finding of fact the court by which the court deems adequate, the decision will be set aside. 2 F. E. Cooper, State Administrative Law 465-67 (1965). There are suggestions in numerous State Court decisions that even without express statutory requirements it is mandatory that the agency renderings incorporate suitable findings of fact in order to satisfy procedural due process. See A. DiCillo & Sons v. Chester Zoning Board, 98 NE 2d 352, (356) (Ohio Court Common Pleas 1950), Laney v. Holbrook, 150 Fla. 622, 8 So.2d 465, 146 ALR. 202 (1942), Appalachian Power Company v. Commonwealth, 132 Va. 1, 110 SE 360 (1922), Swars v. Council of City of Vallejo, 33 Cal. 2d 867, (871), 206 P.2d 355 (358) (1949), New England Telephone and Telegraph Company v. Kennely, 81 R.I. 1 (6), 98 A.2d 835, (838) (1953).

The due process rationale is also supported by Federal decisions Wichita Rail and Light Company v. Public Utilities Commission, 260 US 48, (59), 43 S.Ct. 51 (55), 67 L.Ed. 124 (1922). In the Wichita case, the court said that a certain course of procedure was required by the legislature to prevent what would otherwise be a pure delegation of legislative power. Later, in Mahler v. Eby, 264 US. 32 (44), 44 S.Ct. 283 (288), 68 L.Ed. 549 (1924), the court voided an agency order "not only on the language of the statute but also on general principals of constitutional government."

The Supreme Court has also expressed the belief that implied findings are insufficient to sustain an order. In

Atchison, T. & S.F. Ry. Co. v. US., 295 US 193 at 201-201 the court said:

> "This court will not search the record to ascertain whether, by use of what there may be found general and biguious statements in the report intended to serve as findings may, by construction, be given a meaning sufficiently definite and certain to constitute a valid basis for the order. In the absence of a finding of essential basic facts, the order cannot be sustained."

In *Saginaw*, supra, the court held that it was not the duty of a tribunal to make findings for an agency and where the body failed to make findings, reversible error results. 96 F.2d at 562-63.

Disparate treatment of similarly situated parties (as in this case, similarly worded authority) must be explained by the agency. In Contractors Transport Corp. v. US, 537 F.2d, 1160 (1162) (4th Circuit 1976), the court remanded an agency order stating: "[i]f the commission does not alter its decision, it should explicitly state its reasons for the apparently inconsistent treatment." Accord, Ace Motor Freight v. ICC 40 Pike and Fischer, Ad.L.2d 1164 (D.C. Cir. 1977), Melody Music, Inc. v. FCC, 345 F.2d 730 (D.C. Cir. 1965). Alabama case law is in agreement with the principal. The courts require that administrative rulings be consistent. To act in one way in one case and then in a different manner in another case (as to define non-radial authority in different ways in cases involving the same language), where the same circumstances exist as to material issues, would be to act arbitrarily or, at best, unreasonably. Mobile County Gas District v. Mobile Gas Service Corporation, 284 Ala. 664, 227 So2d 565 (571) (1969).

Concerning the question of evidence necessary to sustain an administrative decision the Supreme Court has said:

> ". . . . [W]here it is contended that an order whose enforcement is resisted was rendered without any evidence whatever to support it, the consideration involves not an issue of fact, but one of law which is the duty of the court to examine and decide. Florida East Coast Line v. US., 234 US 167, at 185 (1914)."

The Fifth Circuit has expanded this rule somewhat in holding that it is improper for an agency to base a decision upon evidence which has not been specifically introduced before it. Any findings must conform to that evidence adduced at the hearing. Hornsby v. Allan, 326 F 2d 605 (608) (5th Cir. 1964). Accord, Willner v. Comm. On Character And Fitness, 373 US 96, 83 S.Ct. 1175, 10 L.Ed. 2d 224 (1963), Goldsmith v. US Board of Tax Appeals, 270 US 117, 46 S.Ct. 215, 70 L.Ed. 494 (1926). See also, Mezines J. Stein and K. Ruff 5 Administrative Law Section 41.01 (1979).

Alabama courts also speak of the evidence necessary in administrative decisions. In White Way Pure Milk Company v. Alabama State Milk Control Board, 265 Ala. 660, 93 So2d 509 (513) (1957), the court spoke of the constitutional defects saying:

> ". . . where there is no evidence to support a finding, the courts must intervene, for then there has been a denial of due process."

Alabama law also noted that evidence can be unreliable or inconclusive as to constitute a violation of due process. Patton v. City of Decatur, 337 So2d 321, on remand 337 So2d 177 (1976). It is imperative that the agency act only upon the evidence so as to avoid appearance that the decision was arbitrary and capricious, i.e. the denial of due process. Southern Railway Company v. APSC, 88 F.Supp. 441 (M.D. Ala. N.D. 1950).

Due process of law is a central concern permeating all the issues involved herein. Where a statute requires a finding of fact to validate a decision, failure to make such finding may be unconstitutional. The same may be true if there is no evidence to support the findings. Alabama Power Company v. Fort Payne, 237 Ala. 459, 187 So2d 632, or 132 ALR. 1337 (1939). An administrative body may not exercise its rights, powers and duties arbitrarily. APSC v. Mobile Gas Company, 213 Ala. 50, 104 So. 538 (1925).

Due process prohibits more than unfair procedures, it also prohibits the arbitrary treatment of individuals by the government. McCray v. Bennett, 467 F.Supp. 187 (D.C. Ala. 1978), Schware v. Board of Bar Examiners, 353 US 232, 77 S.Ct. 752, 1 L.E.D2d 796 (1956).

There is no question but that the Hodges operating authority is property. Alaska Air Lines, Inc. v. CAB, 54 F.2d 194 (D.C. Cir. 1976), Board of Regents v. Roth, 408 US 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), Goldfarb v. Kelly, 397 US 254, 90 S.Ct. 1011, 25 L.Ed. 287 (1970), Bell v. Burson, 402 US 535, 91 S.Ct. 1586, 29 L.Ed.2d 90. The case of Wells Fargo Armored Service v. GPSC, 547 F2d 938 (5th Cir. 1977) held not only that operating authority was a property interest requiring procedural due process, but that "the extent of the injury is irrelevant. . . . . and as a result even a temporary seizure of intangibles invokes due process considerations" (941).

See also North Georgia Finishing v. Di-Chem, 419 US 601, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975).

The Report and Recommended Order of the examiner has been erroneously sustained by the APSC, the Circuit Court of Blount County, and the Supreme Court of Alabama on what the *Hilt* case, supra, calls a "hunch". There was no finding of fact to sustain "industry usage" nor was there any substantial evidence to support the conclusion.

The true facts have been ignored. True industry usage has been ignored. The rules and regulations of the APSC on complaint cases have been ignored. The statutory requirement of fact-finding has been ignored. The facts and circumstances at the issuance of the grandfather authority have been ignored.

Hodges and the concerned trucking industry are entitled to fair treatment in the interpretation of their grandfather authority.

CONCLUSION

For the reasons stated, Hodges has been deprived of its property without due process and the case should be reversed.

Respectfully submitted,

JOHN W. COOPER
200 Woodward Building
Birmingham, Alabama 35203
Counsel for Appellants

March , 1980

APPENDIX

IN THE SUPREME COURT OF THE STATE OF ALABAMA

HODGES TRANSFER COMPANY, INC., a corporation, et al., Plaintiffs,	)	
vs.	)	CASE NO. 78-282
ALABAMA PUBLIC SERVICE COMMISSION, et al., Defendants.	)	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Hodges Transfer Company, Inc., a corporation, John E. Hodges and Robbie D. Wood, the Appellants above named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Alabama, affirming the order of the Alabama Public Service Commission and the lower court, entered in this action on February 2, 1979.

This appeal is taken pursuant to 28 U.S.C. Section 1257 (2).

/s/ JOHN W. COOPER

JOHN W. COOPER
200 Woodward Building
Birmingham, AL 35203
322-0677
Counsel for Appellant

I certify that I have served a copy of the foregoing Notice of Appeal by First Class Mail, Postage prepaid to Charles A. Graddick, Attorney General, Robert S. Richard, Attorney for Motor Carrier Appellees, and Stan Foy, Attorney for

Alabama Public Service Commission this the 16th day of January, 1980.

/s/ JOHN W. COOPER

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

Re: 78-282

HODGES TRANSFER COMPANY, INC., et al.
Appellant

vs.

ALABAMA PUBLIC SERVICE COMMISSION, et al.
Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

____ Appeal docketed. Future correspondence should refer to the above number.
____ Court Reporter granted additional time to file reporter's transcript to and including
____ Clerk/Register granted additional time to file clerk's record/record on appeal to and including
____ Appell_____ granted 7 additional days to file briefs to and including
____ Appellant(s) granted 7 additional days to file reply briefs to and including
____ Record on Appeal filed
____ Appendix Filed
____ Submitted on Briefs
____ Petition for Writ of Certiorari denied. No opinion.
xxxx Application for rehearing overruled. No opinion written on rehearing.

____ Permission to file amicus curiae briefs granted
____

/s/ J. O. SENTELL
November 2, 1979 Clerk, Supreme Court of Alabama

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA
SPECIAL TERM 1979

Hodges Transfer Company, Inc., et al.
78-282 v.
Alabama Public Service Commission, et al.
Appeal from Blount Circuit Court

PER CURIAM.

This is an appeal by Hodges Transfer Company (Hodges), a corporation, from a judgment of the Circuit Court of Blount County affirming an order of the Alabama Public Service Commission (APSC) requiring Hodges to cease and desist from transporting commodities under Certificate of Public Convenience and Necessity (Certificate) No. 518, which neither originated at nor are destined for Uniontown, Alabama. We affirm.

Hodges is the holder of Certificate No. 518 which is a grant of authority from the APSC that authorizes it to transport by motor carrier certain specified commodities "between Uniontown and points in Alabama within a 200 mile radius thereof, over irregular routes." Hodges is a successor corporation to John Hodges who was issued the Certificate, on application, under the Grandfather Provisions of the Alabama Motor Carrier Act (Acts 1939, No. 669).

Ross Neely Express, Inc., Baggett Transportation Company, Inc., Alabama Bulk Carrier, Inc., Schwerman Trucking Company, Arrow Truck Lines, Inc., Southern Haulers, Inc., and Truck Transport, Inc., filed a complaint with APSC

alleging that Hodges, John E. Hodges, and Robbie D. Wood were transporting, under authority of the Certificate, commodities which neither originated at nor were destined for Uniontown, Alabama. Various motions were filed and Hodges filed its answer admitting such transportation, but denying that such transportation was not authorized by its Certificate. The parties stipulated that the only issue presented to APSC was the interpretation of Certificate No. 518.

A hearing examiner held a hearing concerning the Certificate, the parties filed briefs, and the examiner issued a report and recommended order that advised the APSC to require any shipments transported under Certificate No. 518 either originate at or be destined for Uniontown, Alabama. Hodges filed exceptions to the examiner's report and recommended order, and complainants replied. Subsequently, APSC entered its order which adopted the examiner's recommendation and ordered Hodges to cease and desist transporting commodities which neither originate at nor are destined for Uniontown, Alabama.

Hodges filed its notice of appeal to the Circuit Court of Perry County and, thereafter, filed its complaint and petition for supersedeas in that court. That court dismissed Hodge appeal on motion of APSC on the ground it was not the proper forum to entertain the appeal. On motion for new trial that court transferred the action to the Circuit Court of Blount County which set a hearing and entered a supersedeas of the APSC order. The Circuit Court of Blount County then entered judgment which: (1) found it had jurisdiction; (2) vacated the supersedeas of the APSC order; and (3) affirmed the APSC order. Hodges filed a motion to alter or amend the judgment; it was denied and Hodges perfected this appeal.

The question before this court is: does the Certificate, which authorizes transportation between a city and other points within a specified radius thereof, authorize transportation between all pairs of points within the specified radius of that city? We answer the question in the negative.

Hodges contends the question should be answered in the affirmative. It contends it was operating in a so-called non-radial manner before Certificate No. 518 was issued; and therefore, its manner of operation before issuance of the Certificate is the true test to be used in interpreting the Certificate's extent of grant of authority. Hodges contends: (1) complainants had the burden of proof to establish that non-radial operations were not authorized; (2) they failed to meet this burden; and (3) it has denied due process by the failure of APSC to make a finding of fact based on the evidence introduced. Hodges further contends the verbiage of its Certificate grants non-radial authority because the language, "on the one hand" and "on the other hand," was omitted from it.

In cases of this nature we review the judgment of the circuit court without any presumption of correctness, because the lower court was not in any better position to review the evidence than we, and no evidence was taken *ore tenus*. *Alabama Public Service Comm.* v. *Redwing Carriers, Inc.*, 279 Ala. 659, 189 So. 2d 342 (1966). The order of the APSC, however, is taken in these cases to be *prima facie* just and reasonable, and the burden to show the contrary is on the party who would overturn the order of the APSC. *Redwing*, supra. Code 1975, § 37-1-124. But, when the case is conducted, as in this case, before a hearing examiner and not the Commission members themselves, the presumption will be accorded the examiner's findings of fact. *Southern Haulers, Inc.* v. *APSC*, 331 So. 2d 660 (Ala. 1976).

Some of Hodges' arguments are difficult to follow. We find no merit in its argument that complainants failed to meet their burden of proof before the APSC. The sole issue before the APSC, as is before this court, was the interpretation of Certificate No. 518. The complainants met their burden by presenting and arguing the Alabama law and facts governing the language of the Certificate at issue. Likewise, Hodges' due process argument is far afield and without

merit. The facts and law needed to adjudicate the issue in this case were presented to the examiner.

In this case the presumptions usually indulged in APSC cases are not involved because the sole issue is the construction or interpretation of certain language in the Certificate. We are, therefore, concerned with whether the hearing examiner and the APSC correctly applied the law of Alabama in determining the authority granted by the language of the Certificate.

Hodges contends that our case of *Alabama Public Service Comm.* vs. *A-OK Motor Lines, Inc.*, 287 Ala. 182, 249 So. 2d 838 (1971), requires the language, "on the one hand" and "on the other hand", to be in a Certificate of Necessity and Convenience in order that such Certificate limit the grant of authority to a radial one. Hodges argues that the Interstate Commerce Commission (I.C.C.) cases hold such language to be required and A-OK adopted those cases. See, e.g. *King Van Lines, Inc.*, 4 F. Carrier Cases, 35,080, affirmed, 220 F. Supp. 551. We disagree.

In *A-OK*, this court merely construed the meaning of the language, "on the one hand" and "on the other hand," contained in a Certificate of Necessity and Convenience. This court did not hold that such language was required in order to limit the grant to radial authority; furthermore, this court did not hold that I.C.C. decisions would control. The court merely stated that decisions of the I.C.C. could be looked to for guidance, *in the absence of authority in this state*, when construing language in a Certificate of Necessity and Convenience. *A-OK*, 287 Ala. at 186. In this case, the language at issue in Certificate No. 518 is controlled by *Martin Truck Line* v. *Alabama Tank Lines*, 261 Ala. 163, 73 So. 2d 756 (1954).

In *Martin* this court construed the following language in Certificate of Necessity and Convenience No. 824.

> " 'Between Birmingham, Alabama, and Mobile, Alabama, and all points within a radius of one hundred twenty-five (125) miles of Birmingham * * *.' "

Like Hodges, the holders of Certificate No. 824 contended the above language granted non-radial authority, in other words, that it could engage in transportation between any pair of points within 125 miles of Birmingham. This court rejected that contention and held the language was a grant of radial authority only. The holding in *Martin* is in line with the principle of law that Certificates of Necessity and Convenience are usually construed rather strictly against the holder. *Towns Truck Lines* v. *Cotton State Express*, 266 Ala. 131, 94 So. 2d 402 (1957).

The language at issue in this case is almost identical to that in *Martin*. Certificate No. 518 reads:

> "* * * Between Uniontown and points in Alabama within a 200 mile radius thereof, over irregular routes."

We therefore hold the *Martin* case is controlling and that Certificate No. 518 grants only radial authority.

Hodges makes a final argument: that irrespective of the language of Certificate No. 518, it should have non-radial authority because it was engaged in non-radial hauling both before and after the issuance of Certificate No. 518. Hodges contends the *Martin* case requires the court to look to the method of operation of the company prior to the issuance of the Certificate in Grandfather Clause cases. This is not correct. Hodges' argument is based upon the following language in *Martin*:

> "To adopt the construction contended for by the appellant, it would be necessary to add the word 'between' at least three times. *Moreover*, the construction contended for by appellant, *would, in our opinion, result in territorial authorization far in excess of that which Ragsdale operated prior to the filing of his application under the 'Grandfather Clause.'* " (Emphasis supplied.) 261 Ala. at 168.

The emphasized language from *Martin* did not provide the basis for the holding in that case, but was merely an additional justification for the decision reached. In fact, this

court in *A-OK* specifically rejected a similar argument as a basis for distinguishing two I.C.C. cases this court consulted for an interpretation of the language, "on the one hand" and "on the other hand." *A-OK*, 287 Ala. at 182.

We have determined the APSC order is correct; therefore, we need not rule on appellees' motion to dismiss the appeal.

For the reasons assigned the judgment below and the order of the APSC are due to be, and are, affirmed.

AFFIRMED.

Torbert, C. J., Bloodworth, Faulkner, Almon and Embry, JJ., concur.

I, J. O. Sentell, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court. Witness my hand this 21 day of September, 1979.

/s/ J. O. SENTELL
Clerk, Supreme Court of Alabama

IN THE CIRCUIT COURT OF
BLOUNT COUNTY, ALABAMA
IN EQUITY

HODGES TRANSFER COMPANY, INC., a corporation, JOHN E. HODGES and ROBBIE D. WOOD, Plaintiffs - Appellants,	)	
VS.	)	CASE NO.
ALABAMA PUBLIC SERVICE COMMISSION and JUANITA W. McDANIEL, as President, and JIM ZEIGLER and C. C. WHATLEY, as members of the Alabama Public Service Commission, Ross Neely Express, Inc., Baggett Transportation Company, Inc., Alabama Bulk Carriers, Inc., Schwerman Trucking Co., Arrow Truck Lines, Inc., Southern Haulers, Inc., and Truck Transport, Inc., Defendants - Appellees.	)	CV-77-50038

DECREE

This case involves an appeal from an order of the Alabama Public Service Commission dated June 20, 1977, in Docket No. 17278, requiring Plaintiffs-Appellants, Defendants before the Commission, to cease and desist transporting commodities pursuant to Certificate No. 518 which neither originate at nor are destined to Uniontown, Alabama.

Subsequent to said order, on July 19, 1977, Plaintiffs-Appellants filed with the Commission their appeal bond and notice of appeal to the Circuit Court of Perry County. On or about August 12, 1977, Plaintiffs-Appellants filed their Bill in the Nature of a Bill of Complaint and Petition for Supersedeas in the Circuit Court of Perry County. Following the Commission's objection to proceeding in Perry County, the Circuit Court of Perry County, on December 14, 1977, transferred the cause to this court.

By order dated April 28, 1978, this cause was set for hearing on June 21, 1978. On May 5, 1978, the Commission filed its Motion to Dismiss and Answer to the Complaint and Petition for Supersedeas. On May 10, 1978, the Commission filed a Memorandum Brief on the jurisdiction issue it raised. On June 20, 1978, Plaintiff-Appellants filed an amendment to the complaint, requesting an interlocutory order *suspending* the order of the Commission, as an alternative to an interlocutory order superceding or staying the order of the Commission. This amendment also struck from the complaint any characterization of the Commission or Commissioners as being Defendants. Also on June 20, 1978, Plaintiffs-Appellants filed a Motion to Strike the answer of the Commission and to strike the Commission as a party to the appeal. On the same day, Plaintiffs filed a memorandum brief on their motion to strike and on the question of the jurisdiction of this court.

The hearing was held on June 21, 1978, and the court heard argument on the petition for supersedeas, the motion to strike the Commission as a party, the motion to dismiss, and the merits of the appeal. The carriers who were complainants before the Commission orally petitioned for leave to intervene, contingent upon a finding by the court that it has jurisdiction. The Commission filed, in open court, a brief in reply to the June 20th brief of Plaintiffs-Appellants. The intervening carriers filed, in open court, a memorandum brief concerning the law governing appeals from decisions of the Commission.

Subsequent to the hearing, on July 10, 1978, the Commission and the intervening carriers jointly filed their Brief on the Merits. Plaintiffs-Appellants did not file a brief after the hearing. On or about July 13, 1978, the Commission, by letter, supplemented its Brief on the Merits. On or about July 14, 1978, Plaintiffs-Appellants replied to the Commission's letter.

By order entered July 13, 1978, the Commission's order

was suspended and superseded pending a final determination of this cause by this court.

MOTION TO STRIKE

Plaintiffs-Appellants cite, in support of their motion to strike the Commission as a party, the case of *Birmingham Electric Company vs. Alabama Public Service Commission*, 254 Ala. 119, 47 So. 2d 449 (1950). However, the Supreme Court again considered this matter in *Alabama Public Service Commission v. A-OK Motor Lines, Inc.*, 287 Ala. 182, 249 So. 2d 838 (1971). In the *A-OK* case, the Supreme Court narrowly construed the effect of the *Birmingham Electric Company* case, and held that the Commission is a proper party to take an appeal to the Supreme Court.

The Commission contends that the Alabama Code contemplates it being a party in the Circuit Court on an appeal from its order. As evidence of this position, the Commission cites Section 37-1-133 of the *Code* and the *A-OK* case, contending it would be anomalous for it to be permitted to appeal to the Supreme Court but not permitted to be a party in the Circuit Court. It also cites Section 37-1-151 of the Code, contending it would be anomalous for notice to the Commission to be required if it was not a party.

Having considered the *Birmingham Electric Company* and the *A-OK* cases, the court is of the opinion, and finds, that the Supreme Court has not squarely ruled that the Commission is not a proper party in this case and before this court, especially as this is a motor carrier case. Furthermore, it appears that the *Code* contemplates the Commission being a party in an appeal to the Circuit Court. Consequently, the motion to strike is due to be denied.

JURISDICTION

Appeals from orders of the Commission in motor carrier cases are controlled by Section 37-3-29 of the *Code*, which specifically permits appeals to the circuit court of the county

in which the carrier has its principal place of business. All the parties agree that the principal place of business of the involved carrier, Hodges Transfer Company, Inc., is in Blount County, Alabama. Cases filed in the wrong court may be transferred to the proper court. Therefore, this court has jurisdiction in this cause, and the motion to dismiss is due to be denied.

THE MERITS

When an appeal is taken from an order of the Commission, the order of the Commission is taken as prima facie just and reasonable, and is not to be overturned unless the appellant carries the burden of showing that the Commission committed prejudicial error in its application of the law or in its finding of facts. Section 37-1-124, *Code of Alabama 1975*, *Eagle Motor Lines v. Alabama Public Service Commission*, 343 So. 2d 767 (Ala. 1977); *Floyd & Beasley Transfer Co. v. Alabama Public Service Commission*, 276 Ala. 130, 159 So. 2d 833 (1963).

In the instant case, the order underlying this appeal requires the Plaintiffs-Appellants to cease and desist transporting commodities, pursuant to Certificate No. 518, which neither originate at nor are destined to Uniontown, Alabama. Certificate No. 518 authorizes the transportation of various commodities, ". . .between Uniontown and points in Alabama within a 200-mile radius thereof . . ." Consequently, the issue before this court is whether the Commission committed prejudicial error by interpreting Certificate No. 518 as authorizing the transportation of the involved commodities only when such transportation either originates at or is destined to Uniontown, Alabama.

The Plaintiffs-Appellants rely on the A-OK case in their argument that Certificate No. 518 grants non-radial authority, or operations between any pair of points within 200 miles of Uniontown. The *A-OK* case involved a certificate authorizing the transportation of certain commodities between Birmingham and points within 15 miles thereof *on the one*

hand, and certain other points *on the other hand*. The Supreme Court held that the words "on the one hand" and "on the other hand " signified a radial grant of authority, and all transportation must originate at or be destined to the points named before "on the one hand." Consequently, Plaintiffs-Appellants contend that the absence of these words denotes a non-radial grant of authority, and Certificate No. 518 authorizes transportation within 200 miles of Uniontown, without being tied to Uniontown as an origin or destination.

Defendants-Appellees contend that the language used in Certificate No. 518 authorizes transportation only *from* Uniontown *to* points within 200 miles of Uniontown and *from* points within 200 miles of Uniontown *to* Uniontown. They cite the case of *Martin Truck Line v. Alabama Tank Lines*, 261 Ala. 163, 73 So. 2d 756 (1954) in support of their contention. *Martin Truck Line* involved Certificate No. 824, which authorizes the transportation of certain commodities between Birmingham, Alabama, and Mobile, Alabama, and all points within a radius of 125 miles of Birmingham, Alabama. The Supreme Court held that it does not authorize transportation between all points within 125 miles of Birmingham. Defendants-Appellees also cite *Service Express, Inc. v. Baggett Transportation Company*, 281 Ala. 666, 207 So. 2d 418 (1968). In that case, the Supreme Court refers to a decree of the Circuit Court of Jefferson County construing another certificate. This certificate authorized the transportation of certain commodities between Tuscaloosa and all points within a radius of 75 miles of Tuscaloosa. That Circuit Court held that all transportation under the certificate must have an origin or a destination of Tuscaloosa.

Having carefully considered this matter, including all pleadings, briefs and motions and the record certified to this court, the court is of the opinion that Certificate No. 518 must be construed in accordance with its plain language. The language used authorizes transportation only *from* Uniontown and *to* Uniontown, with the word "between" being used only for brevity. The position of the Plaintiffs-Appel-

lants could not be adopted without altering Certificate No. 518 to read:

"Between all points within 200 miles of Uniontown."

Such language was not selected when Certificate No. 518 was issued, and it cannot be adopted through construction.

The reading of the *A-OK* case by Plaintiffs-Appellants is untenable. *A-OK* did not hold that the absence of "magic" words would authorize transportation between all points in a given territory, especially where a certificate plainly reads that it authorizes transportation only from and to one town. Furthermore, Plaintiffs-Appellants have failed to draw a valid distinction between the instant case, and the *Martin Truck Line* case.

Consequently, it does not appear that the Alabama Public Service Commission erred in the order from which the appeal was taken.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED, That the Motion to Strike the Alabama Public Service Commission as a party is denied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, That the motion to dismiss this action is denied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, That the Order of the Alabama Public Service Commission in Docket No. 17278, dated June 20, 1977, is affirmed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, That the order heretofore entered on July 13, 1978, suspending and superseding the Order of the Alabama Public Service Commission, is hereby vacated as of midnight on the day following the date of this Decree.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, That all costs are taxed against the Plaintiffs-Appellants.

DONE AND ORDERED this the 20th day of October, 1978.

/s/ CARL D. NESMITH
Circuit Judge

STATE OF ALABAMA
ALABAMA PUBLIC SERVICE COMMISSION
P. O. BOX 991
MONTGOMERY, ALABAMA 36130

IN THE MATTER OF:	)	
Ross Neely Express, Inc.,	)	
Baggett Transportation Company, Inc.,	)	
Alabama Bulk Carrier, Inc.,	)	
Schwerman Trucking Co.,	)	
Arrow Truck Lines, Inc.,	)	
Southern Haulers, Inc., and	)	
Truck Transport, Inc.,	)	
Complainants,	)	
vs.	)	DOCKET NO.
Hodges Transfer Company, Inc.	)	17278
John E. Hodges and	)	
Robbie D. Wood,	)	
Defendants.	)	

REPORT AND ORDER OF THE COMMISSION

BY THE COMMISSION:

By Complaint filed on November 15, 1976, Ross Neely Express, Inc.; Baggett Transportation Company; Alabama Bulk Carrier, Inc.; Schwerman Trucking Co.; Arrow Truck Line, Inc.; Southern Haulers, Inc.; and Truck Transport, Inc., hereinafter referred to collectively as Complainants, instituted the instant Complaint proceeding against Hodges Transfer Company, Inc., John E. Hodges, and Robbie D. Wood, hereinafter referred to collectively as Defendants.

By agreement of the parties, the issue presented to this Commission was and is the interpretation of Certificate No. 518 heretofore issued by this Commission.

The Complainants argue that any transportation performed pursuant to said certificate must either originate at or be destined to Uniontown, Alabama. The Defendants argue that said certificate authorizes the transportation of

pertinent commodities between all points within a radius of 200 miles of Uniontown, Alabama, and that such transportation need not either originate at or be destined to Uniontown, Alabama.

Hearing was had on January 20, 1977, before Examiner Carl Evans. Following hearing, Complainants and Defendants filed simultaneous briefs. Thereafter, the Defendants filed a Reply Brief, together with a late-filed exhibit. Complainants then filed their Reply Brief.

Examiner Evans then issued his Report and Recommended Order, bearing service date of April 19, 1977, wherein he recommended that this Commission should interpret said certificate as requiring that any shipment transported pursuant to Certificate No. 518 must either orginiate at or be destined to Uniontown, Alabama. The Defendants excepted to said Examiner's Report and Recommended Order, and Complainants replied to such Exceptions.

We have very carefully considered the entire record in this matter, including evidence of record, Docket 8534, briefs and other pleadings of the parties, and the Examiner's Report and Recommended Order. Said Examiner's Report is well reasoned and we hereby adopt it and make it a part of this Report and Order as fully as if set out herein at length. We find that the findings and recommendations of Examiner Evans are well taken and due to be adopted. We, therefore, find that commodities transported pursuant to Certificate No. 518 must either originate at or be destined to Uniontown, Alabama.

IT IS, THEREFORE, ORDERED BY THE COMMISSION, That the Defendants are hereby ordered to cease and desist transporting commodities pursuant to said Certificate No. 518 which neither originate at nor are destined to Uniontown, Alabama.

IT IS FURTHER ORDERED BY THE COMMISSION, That this Order shall be effective as of the date hereof.

DATED at Montgomery, Alabama, this 20th day of June, 1977.

ALABAMA PUBLIC SERVICE COMMISSION

/s/ JUANITA MCDANIEL, President

/s/ JIM ZEIGLER, Commissioner

/s/ C. C. WHATLEY, Commissioner

ATTEST: A True Copy

/s/ WALLACE TIDMORE, Secretary

STATE OF ALABAMA
ALABAMA PUBLIC SERVICE COMMISSION
P. O. BOX 991
MONTGOMERY, ALABAMA 36130

SERVED: April 19, 1977

/s/ WALLACE TIDMORE

Exceptions, if any, must be filed with the Secretary, Alabama Public Service Commission, P. O. Box 991, Montgomery, Alabama, 36130, and served on all other parties of interest, within 20 days from the date of service shown above, or within such further period as may be authorized for the filing of exceptions. Replies to exceptions may be filed within 10 days from the date of service of the Exceptions. At the expiration of the period for filing of exceptions, the within Report and Recommended Order will become the Report and Order of the Commission unless exceptions are filed seasonably or the time for filing exceptions is extended by the Commission or the Commission within such period stays or postpones the Order.

IN THE MATTER OF:	)	
Ross Neely Express, Inc.,	)	
Baggett Transportation Company, Inc.,	)	
Alabama Bulk Carrier, Inc.,	)	
Schwerman Trucking Co.,	)	
Arrow Truck Lines, Inc.,	)	
Southern Haulers, Inc., and	)	
Truck Transport, Inc.,	)	
Complainants,	)	
vs.	)	DOCKET NO.
Hodges Transfer Company, Inc.	)	17278
John E. Hodges and	)	
Robbie D. Wood,	)	
Defendants.	)	

EXAMINER'S REPORT AND
RECOMMENDED ORDER

By Complaint filed on November 15, 1976, Ross Neely Express, Inc.; Baggett Transportation Company; Alabama Bulk Carrier, Inc.; Schwerman Trucking Co.; Arrow Truck Lines, Inc.; Southern Haulers, Inc.; and Truck Transport, Inc., hereinafter referred to, collectively, as Complainants, instituted the instant complaint proceeding against Hodges Transfer Company, Inc., John E. Hodges, and Robbie D. Wood, hereinafter referred to, collectively, as Defendants. Each of the Defendants was served by the Commission with a copy of said Complaint. The Defendants thereafter filed a pleading entitled, "Demurrer or Motion To Dismiss". Complainants then filed their Motion For Immediate Relief, to which the Defendants filed their Motion To Strike Said Motion For Immediate Relief. Defendants then filed their answer.

Pursuant to notice of January 6, 1977, said complaint proceeding came on for hearing on January 20, 1977. Following hearing, Complainants and Defendants filed simultaneous briefs. Thereafter, the Defendants filed a Reply Brief, together with a late filed exhibit. Complainants then filed their Reply Brief.

This complaint proceeding was not heard by the Commission, hence, this Report and Recommended Order.

The Commission's records reflect that John E. Hodges, d/b/a Hodges Transfer Company, pursuant to Docket No. 8534, was granted Certificate No. 518 by order dated September 23, 1942, pursuant to the so-called "grandfather clause" of the Motor Carrier Act of 1939. By Supplemental Order dated November 11, 1942, Certificate 518 was amended by the Commission to grant Mr. Hodges authority to transport farm products. Therefore, as of November 11, 1942, Mr. Hodges held the following authority from this Commission:

> Brick, cement, corn, cotton, coal, cottonseed, cottonseed meal, cottonseed hulls, cotton ties, cooking oil, fertilizer,

farm machinery, furniture, hay, hardware, jute bagging, lime, livestock, lubricating oil, lumber, molasses, pipe and pipe fittings, peanut meal, scrap iron, soil pipe, sand and gravel:

Truckloads only, not less than 10,000 pounds, between Uniontown and points in Alabama within a 200 mile radius thereof, irregular routes.

Farm products: Between Uniontown and points in Alabama within a 200 mile radius thereof, over irregular routes.

* Said Certificate 518 remained in the hands of John E. Hodges until May 27, 1976 when said certificate was transferred to Hodges Transfer Company, Inc., as reflected in Docket No. 17102. The corporate stock of the said Hodges Transfer Company, Inc., was then transferred to Defendant, Robbie D. Wood, said latter transfer not being subject to nor requiring approval of this Commission.

Defendant, Robbie D. Wood, is the owner of Certificate No. 2897, having been issued by this Commission authorizing the transportation of certain named commodities in intrastate commerce, in Alabama. There is now pending before * this Commission, in Docket No. 17165, an application filed by Defendant, Mr. Wood, wherein Mr. Wood seeks to extend and enlarge the operations now authorized by said Certificate 2897. The authority now owned by Mr. Wood, Certificate No. 2897, and the authority issued as Certificate No. 518, now controlled by Mr. Wood, are duplicative of each other in several respects, both commodity-wise and territory-wise.

By agreement of the parties hereto, the single issue presented to this Commission in this proceeding is the interpretation of said Certificate 518. The Defendant, Hodges Transfer Company, Inc., admits that it is transporting commodities pursuant to said certificate which neither originate at or are destined to Uniontown, Alabama, alleging that said certificate authorizes the transportation of certain named com-

* = Not in or contrary to record

modities from, to and between any and all points within a 200 mile radius of Uniontown, Alabama. The Complainants allege that such admitted operations are not authorized by said certificate . . . that any operations performed pursuant to said certificate must either originate at or be destined to Uniontown, Alabama.

At the hearing in the instant case, Defendants urged this Commission to take notice of the entire proceeding in this Commission's Docket No. 8534, being the grandfather application of John E. Hodges, d/b/a Hodges Transfer Company. A portion of that docket was physically introduced in exhibit form in the instant case. The Examiner has very carefully studied Docket No. 8534 in its entirety, including those portions thereof introduced by Defendants in the instant proceeding. Defendants make much of the fact that John E. Hodges, d/b/a Hodges Transfer Company introduced certain traffic studies in connection with this grandfather clause application, which traffic studies show, according to the Defendants, the transportation of commodities which neither originate at nor were destined to Uniontown, Alabama. The Complainants argue that such traffic studies involved, as here pertinent, the transportation of exempt commodities or commodities over which this Commission has historically not exercised its jurisdiction until very recently.

The Examiner is of the opinion that there is no clear error shown on behalf of the Commission in its Docket 8534. Even if it were otherwise, the Examiner is of the opinion that it is highly questionable whether this Commission could take any action in the instant proceeding to correct any error which might have been made, arguendo, by said Commission in 1942. The Alabama Supreme Court, in the case of *APSC v. A-OK Motor Lines, Inc.* 287 Ala. 182, 249 So. 2d 838, held that even if the wording of a certificate of public convenience and necessity issued in 1940 to a motor carrier which filed a "grandfather" application were erroneous, such motor carrier's successor could not obtain correction of such error in 1966. The Court in that case held, in part, at Page

841, that "if the wording of the certificate is erroneous, the time for correcting such error has long ago passed". The Court observed in A-OK that the holder of the certificate in question did not file an appeal and did not file a petition for reconsideration as provided for. In the instant case at bar, John E. Hodges, d/b/a Hodges Transfer Company did not appeal from, nor did he petition for reconsideration of, this Commission's granting order.

At the outset, the Examiner wants to make it perfectly clear that the instant case is not one wherein the holder of the authority in question has come before the Commission to reform or otherwise change authority which was granted as a result of its grandfather application. There have been such cases in the past such as the case of Jack Phillips, d/b/a Phillips Truck Line, Docket No. 16704. In that case Jack Phillips petitioned this Commission to issue an order to effectively change authority granted to Jack Phillips, the basis for that petition being a showing that the authority granted initially by this Commission was in error based upon evidence submitted by Jack Phillips in said grandfather proceeding. This Commission did, in fact, issue such an order and an appeal was taken to the Circuit Court of Montgomery, Alabama, Case No. 38943E. After hearing, said Circuit Court issued its Final Judgment dated January 16, 1975, wherein said court held that this Commission's Order dated January 10, 1974, in its Docket No. 16704, was unlawful, invalid, and erroneous.

It is therefore the opinion of this Examiner that even if the instant proceeding were one where the holder of Certificate 518 had petitioned this Commission to reform or amend the orders of this Commission heretofore issued by it in 1942, this Commission could not lawfully do so.

Additionally, even if it could be held that John E. Hodges, d/b/a Hodges Transfer Company, had some standing to seek to have this Commission amend this Commission's order issued in 1942, it is very possible that John E. Hodges, * d/b/a Hodges Transfer Company, lost that standing before this Commission when he transferred Certificate 518 to Hodges Transfer Company, Inc. In any event, whether the movant be John E. Hodges, d/b/a Hodges Transfer Company, or Hodges Transfer Company, Inc., the Examiner is of the opinion that this Commission cannot, in 1977, reform or amend orders issued by this Commission in 1942, even if the instant proceeding were the proper vehicle for such an effort, which it is not.

As a general rule, the courts have held that a certificate is usually construed rather strictly against the recipient of the grant of authority. See *Towns Truck Lines, Inc. v. Cotton States Express, Inc.*, 266 Ala. 131, 94 So. 2d 402 (1957).

In the case of *Martin Truck Line, Inc. v. Alabama Tank Lines, Inc., et al.*, 261 Ala. 163, 73, So. 2d 756 (1954), the Alabama Supreme Court was called upon to construe the following authority:

> Between Birmingham, Alabama, and Mobile, Alabama, and all points within a radius of One Hundred twenty-five (125) miles of Birmingham, Alabama.

As here pertinent, the authority interpreted in the *Martin Truck Line* case as almost identical to the authority in the instant case. In the *Martin Truck Line* case, Martin contended, as here pertinent, that it had authority to transport the involved commodity between all points within a radius of 125 miles of Birmingham, that is, from any points within a radius of 125 miles of Birmingham to Birmingham or any other point within a radius of 125 miles of Birmingham. The Supreme Court of Alabama held to the contrary, agreeing with the trial court that, as pertinent, shipments by Martin must either originate at or be destined to Birmingham.

* The Examiner is very much aware of the fact that there are numerous carriers which hold authority from this Commission worded similarly to that held by Hodges Transfer Company, Inc. Therefore, the interpretation placed upon

Certificate 518 in the instant proceeding could have far-reaching effect upon such similarly worded authorities.

* Based upon the *Martin Truck Line* case, and industry usage within the motor carrier industry in Alabama for many years, the Examiner is of the opinion and respectfully submits that this Commission should find that any shipment transported pursuant to Certificate 518 must either originate at or be destined to Uniontown, Alabama. To hold otherwise would be to grant to Hodges Transfer Company, Inc., and to all holders of similarly worded authorities operating authority for which there has been no need shown.

There is one matter involved in the instant proceeding which, while not necessary to the determination of the issue before the Commission, should, in the Examiner's opinion, be mentioned. Exhibit 3, in the instant proceeding, introduced by Defendants, is a letter dated December 4, 1975, from Attorney John W. Cooper to John E. Hodges, Jr., with a copy being shown to this Examiner. In that letter, Mr. Cooper made certain representations with respect to certain statements and/or opinions allegedly made or given by this Examiner in conversations had between Mr. Cooper and this Examiner.

As I testified in the instant proceeding, beginning at Page 16 of the Transcript, I do recall conversations with Mr. Cooper, but I do not remember exactly what was said. I do remember receiving a copy of said letter and I do remember, as I testified, that at the time I received said letter I was impressed by the fact that the representations made in the letter were stronger than any which I probably would have made under the circumstances. In any event, I would certainly never make any representations to anyone indicating those representations to be binding upon the Commission. Mr. Cooper has been practicing before this Commission for many years and knows, as does all of the Commission's Bar, that any opinion, whether oral or written, secured from any member of the Commission's Staff is not

binding upon the Commission and if relied upon, is done so at the peril of the person relying upon such.

Respectfully submitted,

/s/ CARL L. EVANS,

Hearing Examiner